Office-Supreme Court, U.S.
FILED
APR 6 1981
ALEXANDER L. STEVAS,
CLERK

80-1730

NO.

IN THE

# Supreme Court of the United States

October Term, 1980

GILES M. LUGAR
Petitioner

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Robert L. Morrison, Jr.
WARREN, PARKER, WILLIAMS AND STILWELL
317 Patton Street - Suite B
Danville, VA 24541
(804) 793-4912

Counsel for Petitioner

APPELLATE PRINTING SERVICES INC. HERITAGE BLDG. RICHMOND, VA (804) 643-7789

## QUESTIONS PRESENTED

The Plaintiff-Petitioner, Giles M. Lugar, brought suit in the United States District Court for the Western District of Virginia alleging a cause of action for deprivation of civil rights under 42 U.S.C. §1983. The deprivation complained of was prejudgment attachment of Plaintiff's business assets. Jurisdiction was alleged to lie under the provision of 28 U.S.C. §1343 and 28 U.S.C. §1331.

The trial court acting sua sponte dismissed on the ground that there was no state action involved sufficient to state a claim cognizible under 42 U.S.C. §1983.

The Court of Appeals disagreed with the trial court's opinion, but affirmed the dismissal on the theory that joint engagement with the state, sufficient to amount to a cause of action requires usurpation, or corruption of state power by the creditor or such a surrender of power that the independence of the official is lost.

The questions thereby arising are:

1. Whether the action of the United States Court of Appeals for the Fourth Circuit, in affirming the trial court, is in conflict

with the decisions of the Courts of Appeals of other circuits which have found explicitly, or by implication, that there is jurisdiction and a cause of action stated under the same or similar circumstances.

2. Whether the United States Court of Appeals for the Fourth Circuit, in affirming the trial court, has rendered a decision on a federal question which conflicts with applicable decisions of this Court.

3. Whether the holding of the United States Court of Appeals for the Fourth Circuit that official corruption or surrender is necessary

to constitute a cause of action raises an important issue of federal law which should be decided by this court.

The petitioner, Giles M. Lugar, the plaintiff in this proceeding respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 3, 1981.

## OPINIONS BELOW

The opinion of the District Court for the Western District of Virginia is unreported and unpublished and appears as Appendix, A infra, pp. 32. The Opinion of the Court of Appeals is yet unreported but published, appears as Appendix B, infra, pp. 42.

## JURISDICTION

The Order or Judgment of the Court of Appeals for the Fourth Circuit was entered on January 9, 1981. See Appendix B, pp. 42, infra. This Petition for Certiorari was filed less than ninety (90) days from the aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

INDEX


| | Page |
|---|---|
| Questions Presented ..... | 1 |
| Opinions Below ..... | 5 |
| Jurisdiction ..... | 6 |
| Constitutional Statutory and Rule Provisions Involved ..... | 6a |
| Statement of Facts ..... | 16 |
| Argument I ..... | 23 |
| Argument II ..... | 25 |
| Argument III ..... | 26 |
| Conclusion ..... | 28 |
| Appendix A ..... Opinion of the District Court ..... | 32 |
| Appendix B ..... (Opinion of the Court of Appeals) | |


CASE CITATIONS


| | |
|---|---|
| Diffenbach v. Attorney General of Vermont, 604F.2d 187(2d Cir. 1979) ..... | 25 |
| Flagg Brothers, Inc. v. Brooks, 436 U.S. 149(1978) .. | 21 |
| Fuentes v. Shevin, 407 U.S. (1972) ..... | 25 |

Guzman v. Western State Bank of Devils Lake, North Dakota, 516F.2d 125(8th Cir. 1975) ..... 24

Johnson v. American Credit Company of Georgia, 581 F.2d 526(5th Cir. 1978) ..... 24

Jonnet v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976) ..... 24

Lynch v. Household Finance Corp., 405 U.S. 538(1972) ..... 25

Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973) ..... 24

CONSTITUTIONS CITED

United States Constitution Amend. V ..... 6

United States Constitution Amend. XIV ..... 6

## UNITED STATES STATUTES CITED

28 U.S.C. §1254(1) ..... 2

28 U.S.C. §1331 ..... 3,7

28 U.S.C. §1343 ..... 3,7

42 U.S.C. §1983 ..... 3,8,20
22,26

## VIRGINIA STATUTES CITED

Va. Code Ann. §8-519 ..... 9,17

Va. Code Ann. §8-520 ..... 9-10

Va. Code Ann. §8-524 ... 10-12,17

Va. Code Ann. §8-526 ... 12-13,17

Va. Code Ann. §8-527 ..... 13

Va. Code Ann. §8-533 ... 13-14,17

Va. Code Ann. §8-539 ... 14-15,17

Va. Code Ann. §8-540 ..... 16

IN THE

# Supreme Court of the United States

---

GILES M. LUGAR
Petitioner

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR

## CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Amendment XIV to the UNITED STATES CONSTITUTION provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Amendment V to the UNITED STATES CONSTITUTION provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1331 (a) provides in pertinent part:

> The district courts shall have jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States . . .;

(2) :

(3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . . ;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for relief.

Va. Code Ann. §8-519 (Now §8.01-533) (Code of Va. Vol. 2, 1957 Repl. Vol. p. 375) states in pertinent part:

> If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefore on any one or more of the grounds stated in the following section . . . .

Va. Code Ann. §8-520 (Now §8.01-534) (Code of Va. Vol 2, 1957 Repl. Vol. pp 376-377) provides in pertinent part:

> It shall be sufficient grounds for an attachment that the principal defendant or one of the principal defendants:
>
> :
>
> (4) Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay or defraud his creditors.
>
> (5) Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors.
>
> :

Va. Code. Ann. §8-524 (Now §8.01-537)(Code of Va. 1976 Cum. Supp.) Vol. 2, 1957 Repl. Vol. p. 38 provides in pertinent part:

> Every attachment, except an attachment for rent, shall be commenced by a petition

filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by §8-522.

.
.
.

If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a motion for judgment under Rule of Court 3:18(d) shall be sufficient. The petition shall also set forth the

existence of one or more of the grounds of attachment mentioned in §8-520, and shall ask for an attachment against the specific personal property mentioned in the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of both defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some person cognizant of the facts stated therein.

Va. Code Ann. §8-526 (Now §8.01-540)(Code of Va., Vol 2, 1957 Repl. Vol. p. 382) States in pertinent part:

> Upon the filing of the petition mentioned in §8-524, the clerk or the justice of the peace before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of §8-524.1. . . . If the petitioner

> seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

Va. Code Ann. §8-527 (Now §8.01-541) (Code of Va. Vol. 2, 1957 Repl. Vol. p. 382) states in pertinent part:

> Any attachment issued under this chapter may be directed to the sheriff, sergeant or constable of any county or city. Except when otherwise provided, it shall be returnable to a day of a term of the court not more than thirty days from its date of issurance nor less than 10 days from the date of service . . . .

Va. Code Ann. §8-533 (Now §8.01-546) (Code of Va., Vol. 2, 1957 Repl. Vol. p. 384), provides in pertinent part:

> . . . Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand . . . .
>
> Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for attachment, or state his grounds of defense thereto.

Va. Code Ann. §8-539 (Now §8.01-552)(Code of Va. Vol. 2, 1957 Repl. Vol. p. 389) provides in pertinent part:

If the principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that fact, and the attachment shall stand dismissed ipso facto unless within ten days from the service of such notice the plaintiff or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment.

. . .

Va. Code Ann. §8-540 (Now §8.01-553)(Code of Va. Vol. 2, 1957, Repl. Vol. p. 389) provides in pertinent part:

> Any property levied on or seized as aforesaid, under any attachment, may be retained by or returned to the defendant or other person in whose possession it was on his giving bond, with condition to have the same forthcoming at such time and place as the court may require; or the principal defendant may, by giving bond with condition to perform the judgment of the court, release from any attachment the whole of any estate attached.
>
> . . .

STATEMENT OF FACTS

On 1 April, 1977, Petitioner Lugar was the lessee-operator of

a truck stop located in Pittsylvania County, Commonwealth of Virginia.

On 31 March, 1977, the defendent Barbour prepared a Petition for Attachment directed to the Clerk of the Circuit Court of Pittsylvania County as provided in Va. Code Ann. §8-519. [1] This petition, Exhibit A to petitioners Complaint, alleged, in part, that Lugar was converting, assigning and disposing of his assets with intent to hinder or delay his creditors. No fraud or intent to defraud was alleged.

---

1. Title 8 of the Code of Virginia was revised, recodified, and reenacted as title 8.01 effective 1 October, 1978. References herein are to the statutes in force at the time of attachment.

The petition was filed with the clerk, as required by Va. Code Ann. §8-524. The clerk, as commanded by Va. Code Ann. §8-526, issued an attachment directed to the Sheriff of Pittsylvania County, Virginia. The sheriff levied upon Lugar's assets as required by law, Va. Code Ann. 8-533, freezing his assets and closing his business. Lugar filed an affidavit of substantial defense, Va. Code Ann. §8-539; in response to which the creditor posted bond. Va. Code Ann. §8-539.

The first hearing on the attachment petition was held on

19 April, 1977, and, at the creditors request a rehearing was held on or about 1 May, 1977, with a decision dissolving the levy handed down on 4 May, 1977.

The Court of Appeals found that the sheriff "levied upon certain of Lugar's property, effectively sequestering it though it was left in Lugar's possession." (App. B, pp. 48 and 49).

Prior to the levy there was no hearing or fact finding by a judicial officer, no notice to Lugar, no bond posted and no statement of more facts than conclusory allegations which parroted the statute.

After proceedings in the State Courts, Lugar brought this action in the United States District Court for the Western District of Virginia, alleging a cause of action under 42 U.S.C. §1983. Lugar stated as his facts supporting his Complaint that Edmondson's and Barbour's actions were maliciously inspired; the Edmondson and Barbour were joint participants with the state acting under Color of State law; that Edmondson and Barbour, acting with the state, had deprived him of property without due process and that he had been injured thereby.

The District Court dismissed the complaint on the authority of Flagg Bros., Inc. v. Brooks, 436 U.S. 149(1978). The District Court found that there was no state action apparent analogizing the attachment levy to the enforcement of a consensual lien.

Lugar appealed. The case was argued to a three-judge panel in November, 1979. The Court of Appeals, then acting sua sponte, set the matter for a rehearing en banc on January 7, 1980.

The Court of Appeals disagreed with the trial court that Flagg Bros., supra was dispositive.

However, it affirmed the dismissal of the Complaint. It characterized the issue as one of "private action 'under color of state law,' within the contemplation of §1983." Appendix B at 45 .

The Court of Appeals conducted a lengthy analysis. It concluded that since there was no allegation or evidence of "usurpation or corruption of official power" or "surrender of power [by a state official] so that the independence of the enforcing official has been compromised to a significant degree and the official powers have become in practical effect shared

by the two," that no cause of action was stated. App. B at 103-4. The Court characterized the attachment proceeding as submission by a litigant of "his interests along with those of his adversary to the neutral administration of the [State's] process by state officials having that responsibility.

ARGUMENT I

Review by this court is necessary as the holding below conflicts with the decisions of Courts of Appeals of other Circuits. These Courts have allowed relief on a cause of action involving private plaintiffs, where the wrong

alleged was a prejudgment attachment or garnishment. Johnson v. American Credit Co. of Georgia, 581 F.2d. 526(5th Cir. 1978); Guzman v. Western State Bank of Devils Lake, North Dakota, 516 F.2d 125 (8th Cir 1975); Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973).

See also, Jonnett v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976) where in the Court found prejudgment attachment statutes unconstitutional. Although this apparently involved diversity jurisdiction, the Court reached

the federal question on the statutes. The implication would be that the Court would recognize a cause of action.

The holding below would also conflict with the analysis and finding of jurisdiction in Diffenbach v. Attorney General of Vermont, 604 F.2d 187, 192-195 (2d Cir. 1979). There the Court of Appeals found jurisdiction based on the involvement of the state judicial process.

II

Review by this Court is necessary as the holding below conflicts with the decisions of this Court in Fuentes v. Shevin 407 U.S. 67 (1972) and Lynch v.

Household Finance Corp., 405 U.S. 538(1972). Both of these cases involve claims for relief against prejudgment garnishment or seizure of property under 42 U.S.C. §1983. Both involved action by state officials at the behest and for the benefit of creditors, without protection to the debtor. This court recognized a cause of action and awarded relief in each case.

III

Review by this court is necessary as the decision below raises an important question of federal law which has not been,

but should be, settled by this court. The decision of the Court of Appeals would establish a requirement that there be corrupt motives and acts by state officials or a surrender of their power to the private party. There is no previous authority for this proposition in the decisions of this Court or the Court of Appeals. The holding further characterizes the initiation of the attachment as submission of interests to a neutral administration of state powers. This not only conflicts with the decisions of this Court and the Courts of Appeals it establishes the

principal that a Court Clerk, acting in his ministerial capacity, is neutral.

The holding below would, by its new definitions, severly restrict the availability of federal relief to aggrieved plaintiffs unable to prove official malice and wrongdoing. The proper standard is an issue undecided by this Court.

The conflicts and issues raised in the above arguments are of continuing importance and should be resolved by this Court.

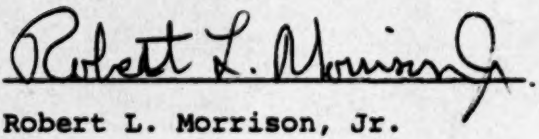
## CONCLUSION

For the above reasons, Petitioner respectfully submits

that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

Robert L. Morrison, Jr.
Attorney for Petitioner
WARREN, PARKER, WILLIAMS, AND STILWELL
317 Patton Street
Danville, VA 24541
(804) 793-4912

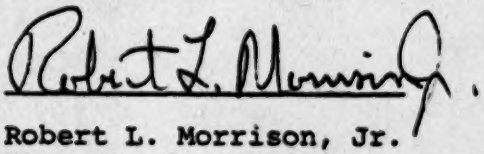
By: 

Robert L. Morrison, Jr.

## CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I am admitted to practice before the Supreme Court of the United States and that I have this the 6th day of April, 1981, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D.C., and have mailed the required copies of said petition for Writ of Certiorari to Jackson Kiser,YOUNG, KISER, HASKINS, MANN, GREGORY & YOUNG, LTD., 60 West Church Street,

Martinsville, VA, and H. Victor Milner, VANSANT, VINES & MILNER, Main Street, Chatham, VA.



Robert L. Morrison, Jr.
Attorney for Petitioner

| | | |
|---|---|---|
| GILES M. LUGAR<br>Plaintiff | + | |
| v. | + | OPINION AND<br>JUDGMENT |
| EDMONDSON OIL<br>COMPANY, INC. | + | 78-0020(D) |
| and | + | |
| RONALD L. BARBOUR<br>Defendants | + | |

Giles M. Lugar has brought suit against Edmondson Oil Company, Inc., and Ronald L. Barbour, the sole owner of Edmondson Oil Company, under 42 U.S.C. Sec. 1983. Lugar alleges jurisdiction under 28 U.S.C. Sec. 1331 and Sec. 1334.

The controversy stems from a petition for attachment which Barbour filed against Lugar. It appears to the court from the record that the

IN THE

# Supreme Court of the United States

---

GILES M. LUGAR
Plaintiff

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR
Defendants

---

APPENDIX A

---

MEMORANDUM AND ORDER

---

clerk of the Pittsylvania County Circuit Court subsequently issued the attachment order and the sheriff levied and attached Lugar's property. The Circuit Court of Pittsylvania County, Virginia, later ordered that the attachment be dismissed. Subsequent to the filing of the Sec. 1983 action by Lugar, the defendants, Edmondson Oil Company and Barbour filed a motion to dismiss on the ground that this court should abstain from deciding this case because the plaintiff challenges the constitutionality of the Virginia statutory attachment procedures.

After review of the record, the court has determined that the complaint is patently defective on its face in that it fails to state a federal claim on which relief can be granted. The principle on which the court is constrained to make this interpretation has been recently restated by the United States Supreme Court in Flagg Brothers, Inc. v. Brooks, 46 U.S.L.W. 4438 (May 15, 1978).

In Flagg Brothers, the court held that the action by the warehouse company in threatening the respondent with sale of her belongings unless she paid her storage

account did not constitute state action. The actions by the private individuals in Flagg Brothers were even more extreme than the actions by the private defendats in this case, since here the private defendants merely filed a petition for attachment. It was rather the sheriff who carried out the proceedings similar to those conducted by private parties in Flagg Brothers. Since the actions of the private parties in Flagg Brothers did not constitute state action, the lesser actions by the private parties before this court therefore do not constitute state action.

It is significant that this plaintiff has not named any public officials as defendants. This aspect of the case before this court parallels the situation in Flagg Brothers. The Supreme Court noted in Flagg Brothers that its earlier decisions which delineated restrictions in the remedies available to creditors can be distinguished because they involved overt official involvement. See North Georgia Finishing, Inc. v. Di-Chem. Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972) Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

The court in Flagg Brothers indicated that in only a few categories of cases have the actions of private parties been attributed to the state. One such category is composed of powers reserved exclusively to states, including elections and the municipal functions of corporate towns. The actions by Edmondson Oil Company and Barbour do not come under either of these headings.

The majority opinion in Flagg Brothers additionally explained that the fact that the state had enacted the law under which the warehouse company took action did not make the company's actions attributable

to the state. Similarly, the fact that Virginia enacted the attachment statutes under which Barbour filed a petition for attachment does not render his actions public.

This court notes that, despite plaintiff's protests to the contrary in its Memorandum in Opposition to Motion to Dismiss, the complaint can only be read as challenging the constitutionality of Virginia's attachment statute. Although plaintiff claims that defendants have violated the statute, he makes no specific elaboration of what actions were irregular under the staute. In addition, plaintiff

argues that even if the attachment were declared valid, he would still have a constitutional claim. This in effect challenges the adequacy of the state statute to protect him from the alleged wrongful acts of the defendants.

If plaintiff nevertheless continues to maintain that he does not challenge the constitutionality of the Virginia statute, then this would serve as an additional basis for dismissal of his complaint. Even Judge Stevens' dissent in Flagg Brothers explains that if a plaintiff merely claims that the defendant deviated from the require-

ments of a state statute, then the plaintiff should present his claim to a state court rather than bring a Sec. 1983 suit.

Since no substantial federal claim exists, this court also dismisses plaintiff's third count which presents a claim only under state law. This court will not extend its pendent jurisdiction to cover this state claim.

Consequently the court on its own motion is constrained to conclude that the complaint, as currently constituted, fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12

(h) (2). Accordingly, the complaint must be and hereby is dismissed without prejudice and it is so ORDERED.

Each party is to bear his own costs of litigation. The clerk is directed to send certified copies of this opinion and order to the counsel of record.

ENTER: July 14, 1978.

Ted Dalton

United States
District Judge

* * *

PHILLIPS, Circuit Judge:

Giles M. Lugar appeals the dismissal of his 42 U.S.C. § 1983 action in which he had alleged that the defendants as private party debt claimants in a state court action had maliciously invoked against him state prejudgment attachment procedures which resulted in the seizure of his property under a levy that was later set aside in the state proceeding because not supported on the facts shown. Claiming that the seizure by levy - whether as authorized by the state attachment statute or as erroneously carried out by state officials[1] - had deprived him

IN THE

# Supreme Court of the United States

---

GILES M. LUGAR
Petitioner

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR

APPENDIX B

Appeal from the United States District Court for the Western District of Virginia, at Danville. Ted Dalton, Judge

Argued: January 7, 1980
Decided: January 3, 1981

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL PHILLIPS, MURNAGHAN and SPROUSE, Circuit Judges, sitting en banc.

Robert L. Morrison, Jr. for Appellant
H. Victor Millner, Jr. and Jackson L. Kiser for Appellee.

[1]There has been considerable confusion throughout the litigation on the question whether Lugar's ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him. The confusion first arose when, opposing the §1983 defendants' motion that the district court abstain to allow state court interpretation of the statute, Lugar suggested somewhat ambivalently that he might not be challenging the statute's constitutionality, so that state court interpretation was not needed. After the motion to abstain was denied, this ambivalence persisted both in the district court and on appeal to this court. The district judge remarked upon it in his memorandum order dismissing the action, and observed in passing - since it had no bearing upon his basis for decision - that whatever Lugar's protestations in opposing the motion to abstain, his continued reliance upon the Supreme Court's creditor remedy decisions beginning with Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), unmistakably involved a challenge to the

1 (cont'd)
statute itself. We completely agree with this assessment. See Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1325 (10th Cir. 1978).

As will appear, it has not been necessary in our disposition of the appeal to address the question whether the property seizure was constitutionally invalid on either ground. We therefore note this confusion only to observe that had the challenge been limited to a claim of unconstitutional application of the statute in the course of the state attachment proceeding, we would have had a clear alternative basis for affirmance of the dismissal. It is well settled that no cause of action lies under § 1983 to redress deprivations of procedural due process occurring during state court litigation between private parties. See, e.g., Girard v. 94th St. & Fifth Ave., Corp., 530 F2d 66 (2d Cir. 1976); Henry v. First Nat'l Bank of Clarsdale, 444 F.2d 1300 (5th Cir. 1971); Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948). But see, Kermit Constr. Corp. v. Banco Credito y Ahorro

of property without due process of law, he sought monetary relief against the state debt claimants.

The issue presented is whether the debt claimants' conduct as alleged constituted private action "under color of state law" within contemplation of §1983. The district court held, relying essentially upon

---

1 (cont'd)
Ponceno, 547 F.2d 1 (1st Cir. 1976). Because, with the district court, we construe Lugar's claim to include a constitutional challenge to the statute itself, the lack of merit in the challenge to the statute's procedural application would not be dispositive of his claim. We, of course, express no view upon the constitutionality of the statute in view of our disposition upon other grounds.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), that the complaint did not allege a deprivation of property by "state action," and accordingly dismissed the action for failure of the complaint to allege a claim cognizable under §1983. Though we do not find Flagg Brothers dispositive as did the district court, we affirm dismissal of the action on the basis that the defendants' conduct as alleged did not constitute private action under color of state law.

I

In the spring of 1977, Lugar was operating a truck stop

in Pittsylvania County, Virginia, and was then indebted to the defendant Edmondson Oil Co., Inc. (Edmondson). Edmondson commenced a civil action to recover on the debt in a Virginia state court, and ancillary to that action petitioned pursuant to state law [2] for pre-judgment attachment of certain of Lugar's property to prevent its dissipation as a judgment satisfaction source. The petition, as verified under oath by the defendant

---

2. The attachment procedure invoked was that now provided by Va. Code §§ 8.01-533 et seq. The ensuing proceedings as summarized in this opinion, were all carried out in conformity with the prescribed procedure.

Ronald L. Barbour, Edmonson's president and sole stockholder, alleged in conclusory terms a belief that Lugar was disposing of or might dispose of his property in order to defeat his creditors and prayed that certain identified property be attached to prevent his doing so. Acting upon the ex parte petition, a clerk of the state court in which the principal action was pending issued a writ of attachment, which was then executed in due course by the county sheriff, who levied upon certain of Lugar's property, effectively sequestering it though

it was left in Lugar's possession. No preattachment bond was required by state law as a condition to securing the attachment, and none was provided, but Edmondson did later post a bond as required by law after Lugar filed an affidavit of substantial defense some days after the levy. Pursuant to statute, a hearing on the propriety of the attachment and levy was later conducted by a state trial judge who then, some thirty-four days after the levy, ordered the attachment dismissed on the basis that Edmondson had failed to carry the burden imposed by state law to

establish by evidence the grounds for attachment alleged in the petition. At this point the petition for attachment was retained on the state court docket and the principal action proceeded to the entry of judgment on the debt in favor of Edmondson. Some of Lugar's property was then sold in execution of the judgment.

Lugar then brought this §1983 action against Edmondson and Barbour, alleging in greater detail the essential facts above summarized as to the course of the state court proceedings; that Edmondson's and Barbour's actions were maliciously

inspired; that the attachment of his property was by virtue of official state action in which Edmondson and Barbour had willingly participated; that this resulted in a deprivation of his property without due process of law; and that in consequence he sustained specifically identified financial loss for which he was entitled to compensatory and punitive damages. [3] As earlier indicated, the district court concluded that the complaint failed

---

3. The complaint alleged two generally comparable federal claims under 42 U.S.C. §1983, and a pendent state claim for malicious prosecution.

to state a claim upon which relief could be granted under §1983, essentially on the basis that Flagg Brothers compelled the conclusion that the private actions of the defendants as alleged did not constitute state action.[4] This appeal followed.

---

4. The dismissal was entered sua sponte, without prejudice, citing Fed.R.Civ.P. 12(h) (2), upon consideration of the defendants' motion to abstain and the plaintiff's response. Though the plaintiff unsuccessfully sought reconsideration of this order in the district court because of the irregularity of the sua sponte dismissal, he has not assigned this as error on appeal, and as appellant, he has freely joined issue of the merits of the dismissal for failure to state a claim for relief.

II

Against this background, we begin analysis by restating, in slightly recast form, the dispositive issue as we perceive it. It is whether the mere institution by a private litigant[5] of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by

---

5. We will refer throughout to the two §1983 defendants, Edmondson Oil Company and its President Barbour, as state court litigants, though only the corporation was a nominal plaintiff. Lugar's claim against Barbour treats him as the corporate defendant's alter ego.

that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of §1983.

Because this formulation of the issue both anticipates and reflects major points in our analysis, we emphasize those of its elements most critical to that analysis. First, it deliberately focuses inquiry upon whether the specific conduct directly chargeable to the §1983 defendants was taken under color of state law, rather than

upon whether the ultimate deprivation of right charged can be attributed to state action. Next, it emphasizes that the conduct directly chargeable to the §1983 defendants is narrowly that of invoking, as private litigants, state judicial proceedings for the adjudication of a private controversy, and includes no earlier or later involvement of the §1983 defendants with state officials other than as private litigants in those proceedings. Finally it emphasizes that the ordering principle being sought is one generally applicable to the non-

collusive invocation by private litigants of any state judicial proceeding, and is not limited to the particular type here in issue - ancillary proceedings for seizure of property for the benefit of creditors.

As suggested in this formulation and discussion of the dispositive issue, we think that its resolution requires, in the first place, careful attention to and refinement of a fundamental congruent, concepts of state action and action under color of state law in §1983 doctrine. To say why requires a brief prelim-

inary alalysis of the way in which evolving §1983 doctrine may have tended to blur or to finesse the distinction, followed by a discussion of the importance of the distinction in making proper application of §1983 doctrine to private defendants in the particular litigation context of this case.

It has become a commonplace that in the typical §1983 case involving a claim of deprivation of a constitutionally secured right, the state action requirement necessitated by the Fourtheenth Amendment's undergirding,[6] and the

---

6. Though the Amendment nowhere uses the term state action, its basic

under color of state law requirement necessitated by the statutory language[7] ordinarily come to the same thing.[8] Nevertheless there

---

6. (cond't)
commands that "no State shall make or enforce any law . . .nor . . . deprive . . . nor deny [rights]," has long since been transmuted in common usage into this shorthand form, which remains firmly fixed in the doctrinal lexicon because of the inescapable fact that the prohibition is addressed only to the "State," even if it be conceded that the prohibited conduct of "making, enforcing, depriving, or denying" might well admit the notion of "inaction" as well as of "action." See generally Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 S. Ct. Rev. 221, 228-32.

7. Again, the term is a shorthand formulation in which

has been occasional recognition that this is not always so - that the two are separate, not necessarily congruent, but cumulative predicate elements of a prima

---

7. (cont'd)
"law" does service for a more complex definition of the sources of state authority in 42 U.S.C. §1983. The reference there is to a "person who, under color of any statute, ordinance, regulation, custom or usage of any State. . . ."

8. The cases are legion reciting that the two terms mean the same thing. See, e.g., United States v. Price, 383 U.S. 787, 794 n.7 (1966); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 642 n.6 (4th Cir. 1975); Gibbs v. Titelman, 502 F.2d 1107, 1110 (3d Cir. 1974); Shirley v. State Nat'l Bank of Conn., 493 F.2d 739, 741 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 329 (9th Cir. 1973).

facie §1983 claim.[9] The reason for all this emerges upon consideration of the way in which the two requirements are confronted in the three basic patterns into which §1983 litigation has tended to fall.[10]

---

9. See, e.g., Flagg Brothers, 436 U.S. at 156 (majority); id. at 177 n.14 (Stevens, J., dissenting); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1969) (majority); id. at 189-90, 210-12 (Brennan, J., concurring and dissenting); Deffenbach v. Attorney Gen. of Vt., 604 F.2d 187, 193 n. 10 (2d Cir. 1979); Lavoie v. Bigwood, 457 F.2d 7, 15 (1st Cir. 1972).

10. The state action requirement is encountered, of course, in various contexts other than §1983 litigation. Closely related to the §1983 litigation context are those

10 (cont'd)
cases wherein a state litigant directly challenges the constitutionality under the Fourteenth Amendment of a state statute in order to be relieved of its legal effect. In most such cases - and Sniadach, 395 U.S. 337, and its progeny are most apposite to the §1983 litigation before us - the existence of state action is manifest in the very fact that state officials are directly charged with and obviously engaged in enforcement of the statute, see Flag Brothers, 436 U.S. at 157, or, as some would see it, in the more fundamental fact that the statute has been enacted by the state legislature, see id. at 172-76 (Stevens, J., dissenting). In consequence, in these cases, state action is ordinarily simply assumed without discussion and because there is no under color of state law requirement even potentially in play, these cases have provided no occasion for developing the distinction.

In the first pattern - the so called "official act" case which makes up the bulk of §1983 litigation - the specific conduct alleged to have deprived of secured right is indubitably only official action,[11] i.e., that alone of state officials acting officially in legislative, e.g., Owen v City

---

10 (cont'd)
Even more closely related to the §1983 action are those wherein companion civil rights statutes such as 18 U.S.C. § 242 are invoked to prosecute for violations of constitutionally secured rights. In such cases dual state action and under color of state law requirements comparable to those grounded in §1983 do exist, but the tendency has been to consider them by reference to §1983 decisions. See,

of Independence, ___ U.S. ___, 48 U.S.L.W. 4389 (Apr. 16, 1980) (No. 78-1779); judicial, e.g., Stump v. Sparkman, 435 U.S. 349 (1978); or executive enforcement, e.g., Monroe v. Pape, 365 U.S. 167 (1961) (police officers) roles. In such cases the

---

10 (cont'd)
e.g., Price, 383 U.S. at 794 n.7. Consequently, they also have not provided any separate sources for refining the distinction.

11 Of course there may be dispute on the preliminary question whether particular §1983 defendants should be deemed agents of the state so that their actions are indubitably state action. See, e.g., Hall v. Quillen, ___ F.2d ___, No. 78-1412 (4th Cir. Oct. 17, 1980) (conduct of court-appointed physician and counsel in civil commitment proceeding not state action).

only possible state action is that of the state officials charged, and the only possibly disputable question[12] is whether those officials were acting under color of state law in doing the act charged. Where dispute has arisen on the latter issue, its resolution has

---

12 That is, disputable in respect of the issues whether state action is involved and whether the defendants acted under color of state law. Of course there may be other disputable questions going to whether the right assertedly violated is one entitled by content to constitutional protection, e.g., Paul v. Davis, 424 U.S. 693 (1976).

necessarily resolved any further question whether the resulting deprivation of right was by virtue of state action. See Flagg Brothers, 436 U.S. at 157 & n.5. Because in most official act cases decided since Monroe v. Pape there is no disputing that the specific conduct charged to officials was done "under color," there has not been any great need arising from these cases to refine the distinction. In these cases, that is to say, the state action question is subsumed in the under color of question, and the latter is seldom raised.

In the second pattern, private actors alone are alleged to have engaged, at what could be called the operational or enforcement level, in conduct that deprived of a secured right. At this level, no state official is involved. If state action is found to exist it is because the private action at the level where deprivation actually occurs is "attributable to the state" by virtue of decisions taken, or policy established, or legislation enacted at higher levels. "Attribution" of this kind of private action to the state may be tested under any of

several theories: practical compulsion by the state, e.g., Adickes, 398 U.S. at 170-71 (compulsion of custom; under "substantive count"); a "symbiotic relationship" between private actor and the state, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (insufficient for state action); or delegation or abdiction to the private actor of an exclusive sovereign function, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no state action; function not exclusively sovereign); Flagg Brothers, 436 U.S. 149 (same).

This pattern also does not force

separate consideration of the two predicates of state action and action under color. The reason is plain. Addressing the attribution issue first - as is appropriate - in effect converts this pattern conceptually into an official-act case one the threshold question is resolved. If state action is found by attribution, the private actor has been found in effect a de facto agent of the state, and the under color of question has been merged in the state action inquiry just as it is in official-act cases. See, e.g., Adickes, 398 U.S. at 170-71

(private action attributed to state because of practical compulsion; action under color of state law assumed without discussion). By like token, if state action is not found by attribution, there is no need to address the under color of state law requirement because the two are cumulative and the claim has already failed. See, e.g., Flagg Brothers, 436 U.S. 149, Moose Lodge, 407 U.S. 163; Jackson, 419 U.S. 345.

Only the third pattern - into which the instant case falls - may make necessary separate consideration of the two requirements. It

does so whenever state action is first found to exist. In this pattern the conduct of a private actor defendant is alleged to have combined with the acts of state officials at the enforcement or operational level to cause deprivation of a secured right. In this situation, as observed by the Supreme Court, the "involvement of a state official . . . provides the state action . . .,"[13] Adickes, 398 U.S. at 152 (conspiracy count); but it does not resolve not even touch upon the further question whether the private defendant's contributing conduct was taken

under color of state law, see id. That remains for separate resolution, and to that problem we now turn, since as indicated, we consider it the dispositive issue in this case.

As a moment's reflection will show, in this pattern the state action requirement can differ from the under color of state law requirement only if the two are

---

13 It should be observed that, as in Adickes itself, the official involvement need not be that of a named § 1983 defendant. In Adickes there was only a single defendant, the private business entity. The state official with whom the conspiracy was alleged was not joined as a defendant.

See also note 16 infra.

referable to different conduct. This is the key to the distinction that is critical to correct application of §1983 to this particular fact pattern. We think that the different objects of reference are readily identified by considering the twin, separate concerns reflected in these two predicate elements of the §1983 cause of action.

Reflecting the ultimate concern that "it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack," Friendly, The Dartmouth College

Case and the Public-Private Penumbra, 12 Tex. Q 17 (No.2 1969 Supp.) the state action requirement is properly referred to the totality of conduct - public and private - that is alleged to have combined in causing the deprivation of right. If state involvement, whether at the enforcement or more remote levels, is a significant contributing factor in this totality, the state action requirement can be found met.

Reflecting, on the other hand, the unmistakable concern expressed in 42 U.S.C. § 1983 to give added protection to federally secured rights by providing a private

tort-like cause of action against particular violators, the under color of state law requirement is properly referred to the specific conduct directly charged to particular defendants. Analyzed in this way, it is plain that to find state action "provided" in this pattern by the "involvement" of state officials in the totality of conduct that resulted in a deprivation of secured right does not decide, nor even address, the separate question whether the private conduct of a particular defendant which was also involved to come extent was under color of state law.[14]

14 This analysis emphasizes the clear relationship between this particular pattern of §1983 litigation and that larger pattern of general tort litigation in which a claimant has suffered injury by reason of the separate actions of more than one person which allegedly have concurred to produce an indivisible injury. See generally Restatement (Second) of Torts, §§875-882 (1977). Viewing this § 1983 pattern in that larger pattern confirms the validity of the separate reference point analysis. In that general pattern, as here, a claimant is under no compulsion to join all potentially liable defendants in a single action; may establish joint and several liability for indivisible injury against all defendants whose conduct can be shown to have concurred in causing the ultimate injury; but is subject to all independent as well as common defenses available to any defendant sued. Id. Set in this more general context, the state action requirement, concerned as it is with the nature of the protected interest and the injury to that interest, is properly referred to the totality of the

12 (cont'd)
conduct leading to the indivisible injury; whereas the under color of state law requirement, concerned as it is with a special attribute of the specific conduct charged to particular tortfeasor defendants, is properly referred to that specific conduct. So viewed, the lack of an under color of state law quality in a §1983 defendant's conduct is of a piece with other independent grounds upon which liability may be escaped by such a defendant even though state action clearly exist in respect of the ultimate deprivation of right charged. See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975) (official immunity); Hall v. Tawney, 621 F.2d 607, 615 (4th Cir. 1980) (only indirect involvement; no vicarious liability).

This analysis may also serve, incidentally, to suggest the rightful limits of an "actor-focussed" approach to state action problems in §1983 litigation, an object of recurring scholarly criticism. See, generally L. Tribe, American Constitutional Law 1147-74 (1978).

This then leads to the question of the appropriate test for determining in this particular pattern of litigation whether private actor conduct has that quality. On this question our most authoritative guidance from the Supreme Court is found in Adickes, where the issue was directly confronted. There, in considering a claim that the private party defendant had conspired with state officials to deprive the claimant of constitutional rights by preventing interracial association, [15] the Court posited two

---

15 The Adickes claim was based upon two counts, one of

elements. First, at the very least, the private actor defendant must have acted "with the knowledge of and pursuant to" the state law in question, 398 U.S. at 161 n.23. Next, and more critically, he must

---

15 (cont'd)
which was the conspiracy count. The other count alleged a direct deprivation of the right by the private defendant's conduct in enforcing state racial segregation custom. This latter count was analyzed by inquiring whether the private conduct, considered alone, was attributable to the state because of the practical compulaion of state custom. In line with our analysis here, once state action by attribution was found in Adickes, the under color of state law requirement as to this count was apparently assumed without discussion. 398 U.S. at 169-71.

have been "jointly engaged with state officials," or, put alternatively, "a willful participant in joint activity with the State or its agents." Id. at 152 (quoting Price, 383 U.S. at 794 n.7) (emphases added).

Taking this as the appropriate analytical framework for the litigation pattern into which the instant case falls, and its separate tests of state action and action under color of state law as the proper ones for application to that pattern, we turn now to their application to the claim sought to be stated by Lugar.

III

A convenient beginning point for the concluding, application stage of our analysis is to consider the Supreme Court's decision in Flagg Brothers which, as indicated, the district court felt was directly dispositive of this case. For reasons that will appear, we do not agree with this view of Flagg Brothers' ultimate implications, though its general importance to decision here is clear. In the course of showing why, we think that the validity of the analytical approach we adopt will be made more plain and that its application to

the facts alleged in this case will also be shown completely compatible with the application of Flagg Brothers' test of state action to the racts in that case.

Flagg Brothers addressed the question whether a private warehouseman's sale of stored goods as permitted under a state statute would expose the warehouseman to possible §1983 liability to the property owner for deprivation of property without due process of law. The statute, New York's version of U.C.C. §7-210, gave the warehouseman a lien for unpaid storage charges and allowed him,

upon ex parte notice to the owner, to sell the property at private sale in execution of the lien. Neither levy nor seizure by state officials nor judicial proceedings of any sort either before or after the sale were required.

After positing the dual requirements that a §1983 defendant's conduct must be both taken under color of state law and attributable to state action, 436 U.S. at 156, the Flagg Brothers Court found the claim deficient on the second: state action had not been shown. The possibility of state action was analyzed under two basic theories

earlier noted in this opinion: (1) that the warehouseman's private conduct might be attributed to the state because it was authorized by statute, or because it involved the exercise of a function lying within the exclusive prerogative of the state; and (2) that state action might be provided, as in Adickes, by "overt official involvement" at the operational level. Both were rejected by the Court. The function exercised - self-help sale in execution of a lien - was not an exclusive function of state sovereignty, and the mere authorization of the procedure by state

legislative enactment did not itself supply the state action element. Id. at 157-66. Neither could state action be found on the basis that state officials were engaged with the private defendant in directly depriving the §1983 claimant of property. On the contrary, said the Court, the §1983 claimants had "named no public officials as defendants" in the §1983 action [16] and there was no "overt

---

16 With all deference, we suggest that this particular point is properly treated as dictum in view of the clear implication from

Official involvement" in the challenged taking of the property by sale. Id. at 157. This latter point sufficed to distinguish the case, said the Court, from those

---

16 (cont'd)
cases such as Adickes (see note 13 supra), Moose Lodge, and Jackson - where no significance was attached to the non-joinder of puboic officials - that this factor has no controlling relevance to the state action issue. The critical point in Flagg Brothers is that there was no "overt official involvement" in the ultimate deprivation charged, not that state officials who might have been joined as defendants were not. But see Flagg Brothers, 436 U.S. at 173-74 (Stevens, J., dissenting).

creditor remedy cases such as North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach, 395 U.S. 337, wherein state action was manifest in the direct enforcement of the creditor remedies by state officials. Having found the state action element wanting in the claimant's statement of claim, the Court was not required to address the separate under color of state law element.

As noted, the district court in this case thought Flagg Brothers dispositive against Lugar's §1983

claim. As the district court saw it, if the warehouseman's self-help conduct in Flagg Brothers could not be attributed to the state, then that of the debt claimants in the instant case clearly could not be. The New York warehouseman's action was "even more extreme" than the "lesser actions" by the private debt claimants who in the Virginia proceeding had merely filed a petition for attachment." Further, said the district court, Flagg Brothers' rejection of the contention that New York's enactment of the warehouseman's self-help statute itself constituted "autho-

rizing" state action was dispositive against any similar contention with respect to Virginia's enactment of the statute invoked by the §1983 defendants here.[17] Finally, to the district court it was also "significant that [Lugar] had not named any public officials as defendants," a factor also noted

---

17 It might conceivably be contended that in cases of this type the state action and under color of state law requirements are properly referred to the state laws providing general access to the courts rather than to the state law authorizing the particular judicial procedure invoked by the §1983 defendant. This possibility has been expressly rejected. See Henry, 444 F.2d 1300. We agree with the rejection.

by the Flagg Brothers court as militating against a finding of state action. [18] Lugar V. Edmondson Oil Co., No. 78-0020(D) (W.D. Va. July 14, 1978).

We agree with the district court's perception of Flagg Brothers' significance for the instant case so far as it concerns finding state action not present under an authorized-by-state-law of exclusive-state-function theory of attribution. If those theories would not support a state action holding for the private warehouseman's self-help conduct in Flagg

---

18 See note 16 supra.

Brothers, they would not support it for the "lesser" conduct of the defendants who in the instant case had simply instituted state judicial procedures which were then conducted under control and supervision of state officials.[19]

The district court failed, however, to take into account the basis upon which the Flagg Brothers Court rejected the alternative theory of state action, i.e., involvement of official conduct

---

19 Cf. Flagg Brothers, 436 U.S. at 170-73 (Stevens, J., dissenting: state action supportable on either theory, particularly exclusive-state-function).

in the actual deprivation of right charged - the taking of the §1983 claimant's property.[20] As to that, the Flagg Brothers Court made a critical distinction between the facts before it and those presented in cases of the type before us. Under the New York self-help procedure, as authorized, there was no "overt" official involvement" in the challenged taking, while under the judicial creditor remedy

---

20 The district court noted the distinction made on this point by the Flagg Brothers Court without comment beyond reference to the fact that, as in Flagg Brothers, no official was joined as defendant in the instant case.

procedures challenged in the Sniadach line of cases, "overt official involvement" in the taking of property was palpable. As the Flagg Brothers Court flatly put it, "[t]his total absence of overt official involvement plainly distinguises this case from earlier decisions imposing procedural restriction on creditors' remedies such as . . . Sniadach . . . ." 436 U.S. at 157.

The instant case obviously cannot be similarly distinguised on this theory of state action from those earlier decisions

involving judicial creditor remedies. If the challenged takings in those cases sufficiently involved state action, then so must the challenged taking through the overt involvement of the state officials - clerk of court and sheriff[21] - in the Virginia attachment proceedings here in question.

---

21 Justice Stevens, dissenting in Flagg Brothers, disagreed with the majority's perception that it was the involvement of comparable state officials in conducting and enforcing the creditors' remedies in the Sniadach line of cases that provided the state action requisite for constitutional attack. He suggested that this sort of official involvement was rightly viewed as that of "minor governmental functionaries" acting ministerially, a type of official-

To hold as we do, however, that in this case - unlike Flagg Brothers, but like Sniadach and its progeny - there is state action in the ultimate taking of property charged as a deprivation of constitutionally secured right, does not address the question whether the specific action charged to the

---

21 (cont'd)
act which has not, in his view, been thought to constitute state action for §1983 purposes. 436 U.S. at 173-74. See also Torres, 588 F.2d at 1327 (mere reading of restraining order by deputy sheriff not state action.). We are, of course, bound on this by the contrary view clearly expressed in majority opinion in Flagg Brothers.

private defendants as a contributing cause of that deprivation was taken under color of state law. As previously noted, that separate question was not reached in Flagg nor was it even potentially in issue in the Sniadach line of cases.[22]

---

22 In Fuentes, 407 U.S. 67, the lone §1983 case in the line, the question might theoretically have been presented as one distinct from the state action question, in line with our analysis of §1983 litigation patterns. In the event, however, it was not presented because of the way the litigation ran its course. In the district court, the §1983 claimants had joined as defendants both the private person who as creditor had invoked the challenged creditor remedy and the state officials charged with enforcement, but sought against them only injunctive and declaratory relief. 317 F. Supp. 954

Within the analytical framework earlier established, this question is properly referred only to the specific conduct chargeable to these defendants - their invocation of and participation as litigants in the judicial proceedings which resulted in the challenged seizure of Lugar's property. As suggested, this question is properly decided by applying

---

22 (cont'd)
(S.D. Fla. 1970) (three-judge court). Probably because in this posture the private party defendant was merely a nominal party to the action for injunctive relief against future enforement of state procedures, the question was simply moot.

the test of private action laid down in Adickes: whether the private actors by this conduct can be said to have engaged or participated jointly with those state officials whose overt involvement supplied the state action element of Lugar's §1983 claim.

Adickes did not further define the concept of "joint participation," but some examples have emerged from the relatively few cases confronting the issue. Adickes itself found it present on the facts of that case in a conspiratorial undertaking between private property owner and state law enforcement

officials to enforce state segregation law or custom against a §1983 claimant. 398 U.S. at 153-57.

Another example of "conspiratorial" conduct between private person and state officials held sufficient to expose the private actor to §1983 liability is provided in Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979). There the §1983 plaintiff alleged that officers of a bank to whom the plaintiff was indebted arranged with a police officer to have the plaintiff arrested for an unrelated misdemeanor and held in custody until a bank officer could arrive to

to pressure her to pay her bank debt. The Tenth Circuit held these allegations of joint participation of private party with state officials sufficient to state a §1983 claim against the former.

A final example - and the most instructive and compelling for our purposes - has recently been provided by the Supreme Court's decision in Dennis v. Sparks, ___U.S. ___ 49 U.S.L.W. 4001 (Nov. 17, 1980). Dennis affirmed the Firth Circuit's en banc decision, 604 F.2d 976 (1979), holding that (1) under Adickes, private state court litigants who by conspiracy with a state judge had induced the latter

to issue an injunction which deprived their adversary of property had thereby acted "under color of state law" for §1983 purposes, and (2) were not entitled derivatively to the absolute immunity defense available to their judicial officer co-conspirator. Reviewing the decision to resolve a circuit conflict on the derivative immunity issue, the Court observed preliminarily that the court of appeals had "correctly understood our cases," citing Adickes, in holding that the §1983 private defendants had acted under color of state law by virtue of their join engagement with state officials in the

challenged action. 49 U.S.L.W. at 4002. By way of contrast, the Court then noted, in a dictum of special significance to our analysis, that "[o]f course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or joint actor with the judge."[23]

---

23 The dissent would apparently dismiss the significance of this dictum by finding in ancillary creditor remedy proceedings of the type here involved a special quality not possessed by the type of state judicial proceedings involved in Dennis. With all respect, we think that nothing in the apposite authorities supports such a view. As indicated earlier in this opinion, the Supreme Court creditor remedy

Whatever these authorities may imply by way of general principle

---

23 (cont'd)
cases have simply not presented the under color of state law issue. See, text at note 22 supra. Furthermore, as earlier observed, the Flagg Brothers Court's ascription of a special quality to those cases was in respect of the existence of state action through "overt official involvement" at the enforcement level in contrast to the private self-help remedy involved in Flagg Brothers. Flagg Brothers recognized in them so special quality in respect of the under color of state law requirement. Finally, it should be noted that the judicial injuction in Dennis and the judicial attachment in the instant case came in the end to the same thing for §1983 purposes: an alleged unconstitutional deprivation of property. See, Torres, 588 F.2d at 1325 (similarity between interlocutory injunctive and sequestration remedies noted). Certainly Dennis itself implied no such distinction.

for the infinite variety of situations involving related private and official conduct that are possible in §1983 litigation, we think they suffice to supply a principle for resolving the question as we confront it. In the setting we consider, "joint engagement or participation" of private actor with state official implies such a usurpation or corruption of official power by the former or surrender ofpower by the latter that the independence of the enforcing official has been compromised to a significant degree and the official powers have become

in practical effect shared by the two. Judged by this test it is plain that merely invoking a state's judicial process and thereafter participating in it solely as private litigant does not constitute joint engagement or participation by the private litigant does not constitute joint engagement or participation by the private litigant with the state officials who then independently conduct and enforce that process.[24]

---

24 The legal deficiency in the under color of state law element in Lugar's statement of claim is not overcome by his allegation that the defendants' institution and prosecution of the state proceeding was

The private initiating act, and the official enforcement acts are in no realistic sense joint but are instead discontinuous and independent. In this context the "essential dichotomy," Jackson, 419 U.S. at 349, between private and public acts seems to us precisely defined at the point where a private

---

24 (cont'd)
malicious. Hoever motivated, the critical point is that the private conduct was independent of, not joint with, the ensuing official conduct of the proceeding. Motive might have some relevance in establishing a qualified immunity defense based upon good faith; but that, of course, is not before us in assessing the sufficiency of the statement of claim. See Gomez v. Toledo, ___ U.S. ___, 48 U.S.L.W. 4600 (1980). See also District 28 v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979).

litigant, having invoked the state's process, thereupon submits his interests along with those of his adversary to the neutral administration of the process by state officials having that responsibility.

Accordingly, we hold that a complaint alleging only this conduct fails to allege that the defendants acted under color of state law.[25] On this basis, the action was properly dismissed for failure to state a claim cognizable under §1983.

AFFIRMED.

---

25 This Circuit has twice before considered the general question we decide here - whether the mere

25 (cont'd)
invocation by a private litigant of state judicial proceedings may expose that litigant to liability under §1983 for any deprivation of federally secured rights that result. In each of those earlier cases, Wellmore, 609 F2d 1083, and Wilkins v. Rogers, 581 F2d 399 (4th Cir. 1978), a panel of this court found no cognizable §1983 claim stated against the private state court litigant. In Wilkins, the §1983 defendant had sued his wife in state court to resolve a title dispute. In Wellmore, the §1983 defendants had sued for and obtained state court injunctions atainst picketing by the §1983 plaintiffs.

While we consider those earlier decisions sound in result, and our decision here completely consistent with them, we have not thought it possible to rely solely upon them as controlling precedent for the result we reach here. In order to put the three decisions in perspective, we think it important to say why.

25 (cont'd)

In Wilkins, as the Wellmore panel noted, the court simply stated, without analysis, that the state court litigant had "not acted with the requisite degree of state action . . ."581 F.2d at 405. No extended analysis was warranted because of the clear lack of any merit to the claim, most obviously because it alleged nothing more than a deprivation of procedural due process in the course of private party litigation in a state court. See note 1 supra.

In Wellmore, a more extended analysis was undertaken, but in its course the court explicitly treated the state action and under color of state law questions as "equivalent," 609 F.2d at 1085 & n.2, and in consequence did not analyze them separately as we have found it necessary to do her. The necessity we have faced was that created by the Flagg Brothers Court's clear implication that a taking of property under state enforced creditor remedies of the Sniadach type does involve state action. That was a necessity that the Wellmore panel thought

25 (cont'd)
not upon it, for it expressly noted that such judicial proceedings might create a different state action problem. 609 F.2d at 1087. Reserving the question whether, under the Flagg Brothers analysis of "overt official involvement" in judicial proceedings, the type of proceeding has any critical bearing upon the state action issue in §1983 claims against the private litigant who instituted them, we observe that both the Wilkins and Wellmore decisions could readily be rested upon the under color of state law analysis we have applied to reach decision in the instant case without reaching any separate state action issue.

Also supporting the result we reach, though upon a variety of rationales, see Louisville Area Inter-faith Comm. v. Nottingham Liquors, Ltd., 542 F.2d 652 (6th Cir. 1976); Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975); Stevens v. Frick, 372 F.2d. 378 (2d Cir. 1967).

RUSSELL, Circuit Judge, concurs in the result.

JUDGE BUTZNER, with whom Judge Winter joins, dissenting:

I cannot concur in the court's restrictive interpretation of 42 U.S.C. §1983.[1] Sound precedent persuades me that a creditor acts under color of law when he uni-

---

1. 42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

laterally invokes an attachment statute[2] and causes a sheriff to levy on his debtor's goods before a judicial officer has determined whether the facts justify pre-judgment seizure.

In Gomez v. Toledo, 100 S. Ct. 1920, 1923 (1980), the Court restated the elements of a cause of action under §1983:

> By the plain terms of §1983, two--and only two--allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

---

2. Va. Code §§8.01.533-576 (1977).

The debtor made both of the required allegations. This appeal, however, is not concerned with the first element. At this stage of the proceedings, the consitutionality of the attachment statute and the creditor's good faith reliance on it are not issues. Good faith is an affirmative defense. Gomez, 100 S. Ct. at 1924. Moreover, the clerk of court and the sheriff are not indispensible parties. Adickes v. Kress & Co., 398 U.S. 144, 152 (1970).

The sole issue involves the second element specified in Gomez. In the context of this case, it is

whether the creditor acted under color of state law within the meaning attributed to this concept in §1983.

Dennis v. Sparks, 49 U.S.L.W. 4001, 4002 (U.S. Nov. 17, 1980), reiterates the Court's explanation of acting under color of law:

> [T]o act 'under color of' state law for §1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of §1983 actions.

Dennis reaffirmed the interpretation of §1983 that the Court expounded in

Adickes, supra 398 U.S. at 152, but Dennis adds this note of caution: "Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." 49 U.S.L.W. 4002. We held as much in District 28 UMW v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979), where resort to a court for a temporary injunction did not establish liability under §1983. But in Wellmore, 609 F.2d at 1086, we carefully distinguished attachment cases, such as Fuentes v. Shevin, 407 U.S. 67 (1972),

where, as here, a creditor unilaterally invoked a statute that did not require notice to the debtor or resort to a court for a hearing before the sheriff seized the debtor's property.

Two Supreme Court cases, which are at opposite poles with respect to creditors' conduct in the context of §1983, explain the principles that govern this appeal. Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978), held that a warehouseman's proposed sale of goods as permitted by state law was not state action within the meaning of the fourteenth amendment. There must be something

more to attribute the warehouseman's act to the state, and at 436 U.S. 157 the Court explained what was lacking:

> This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restructions on creditors' remedies such as . . . Fuentes v. Shevin, 407 U.S. 67 (1972) . . . .

Since the sale could be conducted without the assistance of any state officials, no claim could be made in Flagg that the warehouseman was acting under color of law by willfully participating with the state's agents.

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court found that both elements of a cause of action

under §1983 were satisfied. From the standpoint of the sole issue now before us--whether the creditor acted under color of law--the factual backgrounds of Fuentes and this case are in all material respects similar.[3]

Both Fuentes and this case arose from creditors' ex parte applications to clerks of courts for prejudgment writs directing sheriffs to attach the debtors'

---

3. This is not to say that the creditor in this case is liable. As previously mentioned, liability depends on a declaration that the Virginia statute is unconstitutional and on the resolution of the creditor's good faith defense. Neither of these issues has been addressed, and I express no opinion about them.

property in accordance with state laws. In each case, apart from ascertaining the creditor's facial compliance with the statute, the officials acted in their ministerial capacities. Unlike a judge, they made no factual findings or legal conclusions about the merits of the creditor's claim or even about his justification for seeking immediate seizure. They acted at the behest of and in behalf of the creditor. Obedient to the creditor's petition and the attachment statute, the clerk issued the writ, and the sheriff attached the debtor's goods. The creditor willfully participated

with the officers in this joint undertaking for it was he alone who induced them to act in accordance with the law that he invoked.

Fuentes emphasizes that a creditor under such circumstances does not play a peripheral role. His participation with the officers is the heart of the enterprise. The Court at 407 U.S. 93 described the relatioship between state law and creditors in these terms:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official

> reviews the basis for the claim to repossession, and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.

Thus, Fuentes sustains the conclusion that when, as here, a creditor unilaterially invokes a prejudgment attachment statute to have state agents attach his debtor's goods, it is apparent that the creditor acts under color of state law as a willful participant with the state's agents in a joint undertaking. No other source endows him with the power to enlist the services of state officials for his private

advantage before adjudication of the debtor's right to possession.

To be sure, as the majority opinion points out, a private person acts under color of law when he conspires with a public official to corrupt or subvert state power. See Dennis v. Sparks, 49 U.S.L.W. 4001 (U.S. Nov. 17, 1980). Fuentes, however, explains at 407 U.S. 93 that this is not the only way in which a private person can act under color of law. Indeed, the conclusion this dissent reaches is not unique. Other courts have not questioned that under circumstances essentially

similar to those in this case a creditor acts under color of law within the contemplation of §1983. See, e.g., Welsh v. Kinchla, 577 F.2d 767, 769 (1st Cir. 1978); G. H. McShane Co., Inc. v. McFadden, 554 F.2d 111, 113 (3d Cir. 1977); Kacher v. Pittsburgh National Bank, 545 F.2d 842, 847 (3d Cir. 1976); Tucker v. Maher, 497 F.2d 1309, 1315 (2d Cir. 1974); Rios v. Cessna Finance Corp., 488 F.2d 25, 28 (10th Cir. 1973); Gunter v. Merchants Warren National Bank, 360 F. Supp. 1085, 1092 (D.Me. 1973)(three-judge court.)[4]

---

4. In all of these cases, save Gunter where the issue of damages was

I would vacate the district court's judgment of dismissal and remand the case for further proceedings consistent with this opinion.

---

4. (cont'd)
deferred, judgment was entered for the creditors because they acted in good faith when they attached the debtor's property. In the case before us, the debtor alleged that the creditor acted maliciously, and this allegation apparently would satisfy the pleadings required by the cases cited in the text. Be that as it may, the question of the creditor's good faith is not before us in this appeal. As we have previously mentioned, Gomez v. Toledo, 100 S. Ct. 1920, 1924 (1980), now establishes that good faith is an affirmative defense rather than an element of a cause of action under §1983.

WIDENER, Circuit Judge, concurring in the result:

I think it sufficient to hold under Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and District 28, UMWA v. Wellmore Coal Corp. 609 F2d 1083 (4th Cir. 1979), that a private litigant who does no more than invoke a presumptively valid State judicial procedure, although he may have acted with malice, has not acted under color of State law and thus is not subject to suit under 42 U.S.C. §1983.

MURNAGHAN, Circuit Judge, dissenting:

In large measure I agree with what Judge Butzner has written. I write separately only to call attention to a point or two which seem to merit mention.

1. Judge Butzner tellingly quotes from Fuentes v. Shevin, 407 U.S. 67, 93 (1972) its description of a situtation (replevin under a conditional sales contract) essentially identical with our circumstances of a pre-judgment attachment.[1] That language, especially the reference

---

1. The reference in footnote 23, 407 U.S. at 91, to attachment essential to the securing of the state court's jurisdiction does not reach the present case, where non-residency of the defendant in the state court proceeding did not exist.

to "private parties, serving their own private advantage" indicates that, on the rationale of Judge Phillips in the majority opinion, even after the statute has been authoritatively declared to be unconstitutional, a private individual who manages to prevail upon a bumbling, but non-conspiring clerk to issue a replevin writ under the blatantly unconstitutional statute would still not be acting under color of state law, and, hence, would not infringe 42 U.S.C. §1983. That result seems inescapably wrong.

2. Given the extant decisions, expecially Fuentes v. Shevin, the

constitutionality of the state attachment statute is, at the least, questionable.[2] A hearing is necessary. However, it is desirable to point out that such may not always be so, or that, in another case, regardless of constitutionality, good faith, while normally a matter of affirmative defense, might stand established from the pleadings, or from what the court might accept as a matter of judicial notice. There are situations where tremors first

---

2. The absence of any requirement for pre-seizure judicial action renders the statute suspect.

introduce a breach in what theretofore has been regarded as a solid, safe, and impenetrable legal wall. Such was, perhaps, the case with the seemingly unquestioned validity of wage garnishment and replevin under conditional sales contracts, each obtained without judicial intervention, until Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes first entered upon the scene. Before the decisions in those cases, a judgment for defendants in a §1983 action probably would have been in order, even at the Fed. R. Civ. P. 12(b) stage. An allegation similar to the essentially conclusory

allegation that attachment had been maliciously invoked would probably have been accorded little weight.

But such is not the case here, for Fuentes was decided eight years ago. The wall formerly impenetrable is honeycombed with fissures. The attachment act evidently may be unconstitutional and defendants may have been chargeable with, at least, answerability should the act be found to violate the Fourteenth Amendment.